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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GEORGE CARROLL AND JOHN KIRO, PLAINTIFFS IN ERROR,
v.
THE UNITED STATES OF AMERICA. | No. 117.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR THE UNITED STATES.

STATEMENT.

George Carroll and John Kiro, the plaintiffs in error (hereinafter called the defendants), on September 29th, 1921, while in the apartment of a Federal prohibition agent, who previously knew them by sight (R. 8), at Grand Rapids, Michigan, agreed to sell three cases of whisky to another Federal prohibition agent. (R. 8, 9, 11.) The defendants, however, failed to deliver the liquor. They were then using an Oldsmobile roadster, the appearance and license number of which was noted by such agents. Later, to wit, on December 15th, 1921, the same agents while patrolling the road between Grand Rapids, Michigan, and Detroit, Michigan, on the lookout for violators of the National Prohibition

Law, recognized the defendants coming towards Grand Rapids in the Oldsmobile roadster. The agents knowing, from the previous transaction in September, and having followed the car on the same road on October 6 (R. 8), that the defendants were in the business of selling whisky, and seeing them coming on a road and in the direction used by violators of the Prohibition Law, when carrying their contraband, stopped them. A search of the automobile revealed sixty-eight bottles of whisky concealed behind the upholstery of the back seat. The defendants were arrested, and the liquor was seized.

The defendants' motions for the return of the liquor were denied, and they were convicted for unlawfully transporting spirituous liquor and were fined $500 each. A count in the indictment alleging unlawful possession was withdrawn from the jury by the court. (R. 15.) They have sued out this direct writ of error from this Court.

ASSIGNMENTS OF ERROR.

The assignments of error number 6. (R. 16.) They may be properly condensed into the following:

1. The search made by the Federal prohibition agents was unlawful and the liquor seized was used in evidence in violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States. (Assignments 1 to 5 incl.)

2. The trial Court erred in admitting in evidence certain testimony of one of the prohibition agents as to a conversation which

had taken place in his apartment on September 29th, 1921, between the defendants and another agent.

ARGUMENT.

I.

The search was lawful because reasonable.

The assignments of error herein present for consideration the Fourth, Fifth, and Eighteenth Amendments to the Constitution of the United States. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment provides that no person "shall be compelled in any Criminal Case to be a witness against himself." The Eighteenth Amendment, sec. 1, provides:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The question more directly and concretely stated is, was there an unreasonable search made and there-

fore one which was unlawful because forbidden by the Fourth Amendment? The customary investigation into the reasonableness or unreasonableness of a search is usually prefaced by an historical survey of the issuance of, and opposition to, general warrants and writs of assistance. Such a survey although helpful offers no solution to the present situation. Conditions have changed since the days of John Wilkes and James Otis, when the victims of searches were often contending against a tyrannical government. This age with its fast-moving automobiles and flying machines, together with its little less marvelous agencies of communication make the administration of criminal law—the detection of crime—so difficult that no unnecessary obstacle should be permitted to hinder the Government in the enforcement of its laws. Moreover, the law here under administration, we contend, is of peculiar importance for the reason that it is the expression of Congress in obedience to a special and particular section of the Constitution of the United States, namely the Eighteenth Amendment. In considering a search influenced by such circumstances the question of reasonableness takes on a newer and a more important significance.

The *Gouled*, *Silverthorne*, and *Weeks* cases can not be here used as authorities. Those cases involved the search and seizure of papers, and papers of evidenciary value only. *Gouled* v. *United States* (1920), 255 U. S. 298; *Silverthorne Lumber Co.* v.

United States (1919), 251 U. S. 385; *Weeks* v. *United States* (1913), 232 U. S. 383. Congress has nowhere said that one shall not possess papers. But the case in question concerns contraband, an instrument of crime, a *res* which it is criminal to possess and transport. Title II, section 26 of the National Prohibition Act.

This distinction is important. It has been made by this Court. Mr. Justice Bradley points out the distinction in *Boyd* v. *United States* (1885), 116 U. S. 616, 623, as follows:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof, are totally different things from a search and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto caelo*. In one case, the Government is entitled to the possession of the property; in the other it is not. * * * and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized * * * by our own revenue acts from the commencement of the Government.

To the same effect are the remarks of Mr. Justice Day, in the case involving the search and seizure of papers, in *Weeks* v. *United States* (1913), 232 U. S. 383, 392, where he says:

> What then is the present case? Before answering that inquiry specifically, it may be

> well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. * * * Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

Nor is the *Amos* case controlling. In that case the search was made of the home of the defendant. *Amos* v. *United States* (1920), 255 U. S. 313. It can not be justly claimed that the privacy of one's automobile on a public highway is analogous to or in the same classification as the privacy of one's home. Visitorial power over, and the inspection of, an automobile on the public highway by officials is no new thing. It has long been accepted as one of the many restraints made necessary by social convenience and safety. The public highways are under the constant supervision and control of officers of the law. May a criminal travel along a public highway, hide his contraband under a blanket or behind a seat, violate the law, and smile defiantly at the officials commissioned to prevent such offenses? We submit that the theory of the sanctity of the castle will permit no such interpretation of the law here involved.

Searches without warrants are taking place constantly and are not questioned because they are recognized as reasonable. The legality of searches made by custom officers has not been questioned.

Internal revenue officers could have legally searched the automobile in question in order to ascertain whether or not the revenue laws were being violated. The Act of July 18, 1866, R. S. Sec. 3061, provides:

> Any of the officers or persons authorized * * * may stop, search, and examine, as well without as within their respective districts any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, * * * and to search any trunk or envelope, wherever found, in which he may have reasonable cause to suspect there is merchandise which was imported contrary to law * * *, he shall seize and secure the same for trial.

See also statement of Mr. Justice Bradley in *Boyd* v. *United States, supra.*

The Government, however, does not contend that the presence of an automobile on a highway in itself is sufficient to make a search of it reasonable. But it is submitted that there are additional elements in this case which made the search reasonable. The agents knew that the defendants were selling whiskey, and found them coming on the road and from the direction whence violators of the prohibition law were in the habit of carrying liquor. That knowledge with the concurrent circumstances made the search as reasonable as is considered to be a search made by revenue officers at places of entry.

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II.

A consideration of the law of arrest.

Another solution of the problem may be had by a consideration of the law of arrest. The defendants were committing a crime by transporting the liquor. An officer, at common law, and often by statute has authority to arrest, without a warrant, if a misdemeanor is being committed while he is present. I Wharton, *Criminal Procedure* (10th Ed., 1918), Sec. 35; *Burroughs* v. *Eastman* (1894), 101 Mich. 419; Title II, sec. 26, National Prohibition Act. In case of a felony he can make an arrest without a warrant whether or not it occurred while he was present.

The rule may be more accurately stated as follows: An officer may arrest without a warrant when a crime, either a felony or misdemeanor, is committed and is still incomplete while he is present. If the crime is past and complete before an arrest is made, it is lawful only if the crime is a felony, and unlawful if it is a misdemeanor.

The phrase commonly used to express the rule that an officer may arrest one committing a misdemeanor if it were a present and an incompleted one, is that it must be committed "in his presence." That expression has led to speculation concerning the meaning of "in his presence," and as to what physical senses the officer is permitted to use in order to determine whether or not a crime is being committed in his presence. It is submitted that the application of such a test is erroneous.

The only question to be considered by the court in determining the reasonableness of an arrest is, was it contemporaneous with, so as to be almost instantaneous with, the commission of the crime? If the crime was incomplete and a continuing one, as in the instant case, when the officer made the arrest, it was a lawful arrest.

An illustration will show the fallacy of the other statement of the rule. A misdemeanor is committed in the view of an officer, but the officer prefers not to make the arrest until some few hours elapse, and when the crime is past and completed. Such an arrest, without a warrant, would unquestionably be unlawful. I Wharton, Criminal Procedure (10th Ed. 1918), sec. 37; *Pow* v. *Beckner*, 3 Ind. 475; *Muscoe* v. *Commonwealth* (1890), 86 Va. 443. The true test then is, was the officer present, when the crime was being actually committed, or so recently committed as to be considered a present and not a past one? If he was so present while the crime was incomplete, was continuing, then the arrest was lawful, and any inquiry as to the use of his senses is not warranted.

Title II, Section 26, of the National Prohibition Act gives a Federal prohibition agent the power to arrest, and reads, in part, as follows:

> Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle

or team or automobile, air or water craft, or any other conveyance and arrest any person in charge thereof.

The prohibition officers therefore had the power to arrest when the misdemeanor was being committed; and when an arrest is made an officer may search the prisoner, his surroundings, and his possessions. *Dillon* v. *O'Brien* (1887, Exch.), 16 Cox C. C. 245; *Smith* v. *Jerome* (1905, Sup. Ct.), 47 Misc. 22; 93 N. Y. Supp. 202.

Therefore, in the instant case, as a crime was being committed, and the officers were present while it was continuing, the arrest made was lawful and so also the search. An inquiry into the mental process used by the officers in making the arrest in order to ascertain if the rule "in the presence of" was satisfied, is also fully met, in the instant case, for the information possessed by the officers concerning the propensities of the defendants, and their presence on a "bootlegger's" road gave the officers reasonable grounds to believe that a crime was being committed.

III.

Similar searches have been held to be reasonable by other courts.

Searches similar to the one in question have been held reasonable by other courts; and the opinions rendered in those cases seem so sound that they may assist in the determination of this case.

In *United States* v. *Bateman* (1922, S. D. Cal.), 278 Fed. 231, the opinion of the court is as follows:

> The question raised by this motion is whether or not a prohibition enforcement officer can stop an automobile on a public highway and search it for intoxicating liquors, without the consent of the driver of the automobile, and without a warrant for arrest or search. This proposition involves the interpretation of the Fourth, Fifth, and Eighteenth Amendments to the Constitution of the United States. These amendments are of equal force and importance. It is plain that the Eighteenth Amendment can not be enforced without legislation to enforce it * * *.
>
> Congress on a previous occasion had expressly authorized custom officers to search for goods supposed to be in the United States in violation of the custom laws. These laws were in effect at the time of the adoption of the Eighteenth Amendment. The Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment. If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure as disclosed in this case. In order, therefore, to enforce the Eighteenth Amendment it is necessary for us to determine what is an unreasonable search or seizure.
>
> In adopting the Volstead Act (41 Stat. 305), Congress took into consideration the question

of the right to search and seize certain conveyances. In section 25 of the Volstead Act there is this provision:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

Here is an expression of Congress to the effect that in certain instances search warrants shall not be permitted. If Congress had been of the opinion that to search automobiles on a public highway without a search warrant was unreasonable, it certainly would have included, with the prohibition as to dwellings in section 25, a prohibition as to automobiles.

Congress had the matter directly before it when it enacted section 26, which contains the following language:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

It has been held by one court that that authorized the search and seizure of an automobile transporting liquors in violation of the law. *U. S.* v. *Crossen* (D. C.), 264 Fed. 459, 462. In the act of Congress approved November 23, 1921, section 6 provides as follows:

"That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor."

Again, if Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its conviction, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without reasonable cause.

It is my opinion that there is no legislation of Congress upon the subject of searches and seizures of automobiles except as above specified, and the court must in each individual case determine, as a judicial question, whether or not the search and seizure of an automobile is an unreasonable search or seizure, in view of all the circumstances in the case.

Let us now proceed to consider as a judicial question in this case whether or not it was an unreasonable search or seizure for the officer to have proceeded as he did without a search warrant. The Eighteenth Amendment went into force in January, 1919, and the first section reads as follows: * * *

There is now and has been ever since this amendment went into effect almost a continuous stream of automobiles from at or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a search warrant, the country, of course, would be flooded with intoxicating liquors, unlawfully imported. It is contended that the officers have no right to stop a person carrying a suit case or satchel to search for intoxicating liquors, on the ground that that would be a violation of the Fourth and Fifth Amendments to the Constitution. If a suitcase or satchel could not be searched and seized without a search warrant, a tin container, jug, or bottle could not be taken away without a search warrant from a man carrying it. If an automobile, a suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant under the law can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it. Such an affidavit can not be made upon information and belief, but must be positively sworn to. Before a search warrant could be obtained, of course, the effect to be searched would be out of reach. Any person must necessarily reach this conclusion.

Under those circumstances the Eighteenth Amendment would have been stillborn. The act of more than two-thirds of the House of Representatives, more than two-thirds of the United

States Senate, in passing such Eighteenth Amendment, and all the States of the Union, with the exception of the two smallest, in approving the Eighteenth Amendment, would have been utterly futile, and would have brought about only chaos and confusion. At the time Congress passed the last act above referred to automobiles had been seized by the hundreds without a search warrant. Containers of alcohol had been seized by the thousands without a search warrant. Therefore, if Congress had been of the opinion that it was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures, instead of leaving it to the courts to decide. I think the failure of Congress to act in this matter is a tacit approval of the many acts which had occurred prior to November 23, 1921, and that automobiles might be searched.

Judge Bourquin, in the case of *United States* v. *Fenton* (D. C.), 268 Fed. 221, places the right to search an automobile upon the ground that as soon as the liquor is transported in violation of the law it is forfeited to the United States, and that the United States is then vested with the property and possession thereof; that the transporter has no right in the property, and, therefore, he cannot object to its being used in evidence. Insupport of that proposition, the following authority is cited: *Ex parte Morrill* (C. C.), 35 Fed. 261, 267. * * *.

It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer

> to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search.

In *Lambert* v. *United States* (1922, 9th Cir.), 282 Fed. 413, Federal officers were informed by one Edison that Lambert was selling intoxicating liquor. The officers searched Lambert's automobile and discovered in it a box covered with rags which upon being opened revealed bottles of liquor. The search was held reasonable; and the court, on p. 417, says:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think that the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant.

In *United States* v. *Rembert* (1922, S. D. Tex.), 284 Fed. 996, Federal officers believed that the defendant was drunk while driving his automobile. They searched the car and found liquor. The search was held to be reasonable. The court says on p. 1006:

> Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term "discovery" as used in this act is to be construed in the light of the principles of American and English common law, defining when arrests can be made without a warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officer actually see, before apprehension is made, the liquor the subject of the apprehension.

In *People* v. *Case* (1922), 220 Mich. 379, 190 N. W. 289, an automobile while standing in the road was searched and liquor discovered. The search was held lawful. The court states on p. 386 (N. W. p. 291) as follows:

> Our Constitution contains both a provision against intoxicating liquor and against unreasonable search and seizure. Every constitutional provision as well as statutory should be construed where possible to give effect to every other constitutional provision in the instrument.

And on pp. 388 and 389 (N. W. p. 292) it says:

> The automobile is a swift and powerful vehicle of recent development which has multiplied by quantity production and taken possession of our highways in battalions until the slower animal-drawn vehicles with their easy noted individuality are rare. * * * While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfully utilized to facilitate the commission of crime of all degrees, from those against morality, chastity, and decency to robbery, rape, burglary, and murder is a matter of common knowledge. Upon that problem a condition and not a theory confronts administration of our criminal laws.

Other cases holding similar searches in similar cases reasonable are the following:

United States v. *Snyder* (1922, N. D. W. Va.), 278 Fed. 650.

Bell v. *United States* (1922, 5th), 285 Fed. 145.

United States v. *Hilsinger* (1922, S. D. of Ohio), 284 Fed. 585.

State v. *Mullen* (1922), 63 Mont. 50; 207 Pac. 634.

People v. *De Cesare* (1922), 220 Mich. 417; 190 N. W. 302.

See also:

McBride v. *United States* (1922, 5th), 284 Fed. 416.

Kathriner v. *United States* (1921, 9th), 276 Fed. 808.

Herine v. *United States* (1921, 9th), 276 Fed. 806.

Green v. *United States* (1923, 8th), 289 Fed. 236.

State v. *Simmons* (1922), 183 N. C. 684; 110 S. E. 591.

IV.

Assuming that search was unlawful as to defendant Carroll, it was not as to defendant Kiro.

Assuming that the search was unlawful as to the defendant Carroll it was not unlawful as to the defendant Kiro. It is not denied that both defendants were engaged in transporting liquor. Both Carroll and Kiro in their petitions to return the liquor and the automobile which was seized state that the liquor and automobile belonged to Carroll only. (R. 3–5.) The search, therefore, if unlawful as to Carroll violated no constitutional rights of Kiro. *Wilson* v. *United States* (1910), 221 U. S. 361; *Dreier* v. *United States* (1910), 221 U. S. 394; *Haywood* v. *United States* (1920), 268 Fed. 795.

In the *Haywood* case search and seizure was made of the offices of the I. W. W. The property seized was offered in evidence against a member of the

association and was held to have been properly admitted. The court, on p. 803, says:

> Consider, next, the person whose privacy is invaded. If it be granted that the home of Burglar Smith, in which he has concealed the stolen goods and the implements of his crime, can not lawfully be searched and the property seized, except under a warrant, * * *, it does not follow that Burglar Smith will be heard to complain that the Fourth Amendment has been violated by forcible and unlawful breaking into the home of Burglar Jones and the seizure there of the property and implements of crime of Burglar Smith.

The Fourth Amendment provides that:

> The right of the people to be secure in *their* persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *.

Kiro's security in *his* effects was not violated.

V.

No error in admitting in evidence conversation between defendants and Government agents prior to arrest.

The objection that the admission of the testimony concerning the conversation between the defendants and the Government agents on September 29, 1921, constituted error is groundless. That evidence was offered to show one of the grounds which made the search and arrest of the defendants reasonable. An objection that evidence is incompetent (R. 8) without

stating specific reasons for objection is equal to no objection at all. *See Sparf* v. *United States* (1894), 156 U. S. 51, 57. Also, if the admission of said testimony was error, it was harmless error, because defendants failed to object to the same matter being testified to by another Government witness. (R. 11.)

CONCLUSION.

The existing concurrent conditions above discussed made the search in question reasonable, and therefore lawful. Also by an application of the law of arrest the search was proper. No property of the defendant Kiro was searched or seized and he can not claim a constitutional violation as to him. Defendants' objection to the admission of the conversation between them and the Government agents had no merit, nor was it properly made.

The defendants had a fair trial; no errors were committed by the court which affected prejudicially their substantial rights or constitutional privileges, and the judgment of the lower court should therefore be affirmed.

JAMES M. BECK,
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NOVEMBER, 1923.

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